No. 362

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

BURTON-SUTTON OIL COMPANY, INCORPORATED, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

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ELIAS R. KAUFMAN,
Of counsel for petitioner.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

May It Please the Court:

Petitioner, Burton-Sutton Oil Company, Incorporated, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to hear this cause and to review the decision of the Circuit Court of Appeals in reversing the judgment of the Tax Court of the United States. Petitioner respectfully shows to this Honorable Court:

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves income and excess profits taxes for the fiscal year ended February 28, 1938. It was tried before the Tax Court on the pleadings (R. 3-12, 34-36), stipulation of facts (R. 52) and certain testimony and exhibits (C. R. 5-93)[1]

It was stipulated:

> "It is agreed by and between the parties to the above entitled and numbered cause of action that the following facts shall be taken as true, subject, however, to the right of either party to introduce in evidence other and additional facts not inconsistent with the facts herein agreed to." (R. 45)
>
> * * * * * * * * *
>
> "During the taxable year ended February 28, 1938 the petitioner expended $27,564.61 legal expenses in resisting proceedings instituted by the United States of America on certain of its property. The petitioner had possession of the property for a period of years, had developed the property, obtained production of oil and was deriving a large income therefrom." (R. 52)

The Tax Court's findings of fact on this issue (R. 62-66) included the following:

> "During the taxable year ended February 28, 1938, petitioner expended $27,564.61 in legal expenses (including a $25,000 feet to Cline, Thompson and Lawes) in resisting the above-mentioned condemnation proceedings instituted by the United States. On its return for the said taxable year it deducted this amount as an ordinary and necessary business expense. The

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[1] For the purpose of the hearing parts of the record already printed in the record of docket No. 11,275 of the Circuit Court were omitted from this case, docket No. 11,285. The record in docket No. 11,275 is also before this Court on application for writ of certiorari. Reference to the record in docket No. 11,275 are shown as "R" and those to the record in this case are indicated by "C.R." (Commissioner's Record).

respondent disallowed the item for the reasons given above." (R. 65-66)

"Any part of the stipulated facts not included in the foregoing findings of fact are incorporated herein by reference." (R. 66)

In bringing the proceedings, the Government acted under a survey which in effect moved the theretofore recognized section lines in such a way as to leave petitioner with an interest in oil rights on barren land (C. R. 7). The final judgment fixed the boundaries as petitioner had contended (C. R. 9).

The Tax Court held that petitioner was entitled to deduct these legal expenses (R. 71-74), five Judges dissenting (R. 74-75).

The Circuit Court of Appeals reversed the judgment of the Tax Court (C. R. 110-116), after finding:

> "The deduction claimed by the taxpayer *was not spent by it in resisting the condemnation of its property* or to obtain just compensation for the same" (C. R. 114). (Emphasis supplied)

which finding is directly contrary to the Tax Court's and also to the agreed statement of facts.

Circuit Judge Lee filed a dissenting opinion in which, upon the assumption that the expenditure was not in resisting condemnation proceedings, he expressed the view that the deduction ought to be permitted (C. R. 116-119).

2.

STATEMENT DISCLOSING BASIS UPON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION.

The jurisdiction of this cause is conferred upon this Honorable Court by Judicial Code, Section 240, as amended; United States Code, Title 28, Section 347.

The judgment of the Circuit Court of Appeals was entered July 6, 1945 (C. R. 119).

3.

QUESTIONS PRESENTED.

1. Was the Circuit Court of Appeals authorized to disgard (a) the facts as found by the Tax Court, pursuant to the parties' stipulation and upon the record as a whole, and (b) the finding of the Tax Court to the effect that the expenditures were not in defense of or to perfect title?

2. Was the petitioner entitled to deduct the legal expenditures as ordinary and necessary business expenses?

4.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The reasons relied on for the allowance of the writ are that the Circuit Court of Appeals has decided important questions of Federal law which have not been and should be settled by this Court, and that these questions have been decided in a way probably in conflict with the applicable decisions of this Court, and that they have been decided in a way directly in conflict with the decision of the Sixth Circuit Court of Appeals in *Commissioner* v. *Reakirt*, 84 F. 2d 996 *per curiam* affirming 29 B. T. A. 1296.

(a) The Circuit Court of Appeals found that the Tax Court "overlooked entirely the admitted fact that no interest of the taxpayer was sought to be appropriated" and found that "the deduction claimed by the taxpayer was not spent by it in resisting the condemnation of its property", all of which is contrary to the Tax Court's findings and the parties' stipulation of facts. Moreover, the Circuit Court of Appeals held that the expenditures were in defense of or to perfect title, contrary to the findings of fact and the inferences of fact drawn by the Tax Court, all of which is contrary to the proper rule laid down by this Court in *Wilmington Trust Company, Executor* v. *Helver-*

ing, 316 U. S. 164; *Dobson* v. *Commissioner*, 320 U. S. 489, and *Choate* v. *Commissioner*, 65 S. Ct. 469.

(b) The Circuit Court of Appeals, in denying your petitioner the deduction of the legal expenditure, is in direct conflict with the per curiam decision of the Circuit Court of Appeals for the Sixth Circuit in *Commissioner* v. *Reakirt*, 84 F. 2d 996, affirming 29 B. T. A. 1296, and is contrary to the fundamental holdings of this Court on the deduction of business expense in *Kornhauser* v. *United States*, 276 U. S. 145, and *Commissioner* v. *Heininger*, 320 U. S. 467.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record of all of the proceedings in the Circuit Court of Appeals in said cause entitled *Commissioner of Internal Revenue, Petitioner*, v. *Burton-Sutton Oil Company, Incorporated*, Respondent, No. 11285 on its docket, to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code, as amended, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with the provisions of the Judicial Code, and that on hearing before this Honorable Court said judgment of the Circuit Court of Appeals be reversed.

BURTON-SUTTON OIL COMPANY,
INCORPORATED,
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NORMAN F. ANDERSON,
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